

QUAPAW TRIBE OF OKLAHOMA

P.O. Box 765
Quapaw, OK 74363 0765

(918) 542-1853
FAX (918) 542-4694

April 15, 2013

VIA ELECTRONIC MAIL tax.reform@mail.house.gov
Hon. Dave Camp, Chairman
Ways and Means Committee
U.S. House of Representatives
Washington, D.C. 20515

Hon. Sander Levin, Ranking Member
Ways and Means Committee
U.S. House of Representatives
Washington, D.C. 20515

Re: Indian Tribal Governments and Reform of the Internal Revenue Code

Dear Chairman Camp and Ranking Member Levin:

On behalf of the Quapaw Tribe of Oklahoma (the O-Gah-Pah), I submit for your consideration the following comments related to Indian tribal governments and the Committee's proposed reform of the Internal Revenue Code (the "IRC"). The last comprehensive review and overhaul of federal tax law was in 1986, and much has occurred in the intervening 27 years to justify revisiting the IRC.

As I understand the Committee's plan, these and other comments will be included in a report to be compiled by the Joint Committee on Taxation and delivered to the full Ways and Means Committee by Monday, May 6, 2013.

At the outset, I commend the Committee for launching a broad review of current federal tax law and how it might be reformed with an eye toward encouraging investment and economic activity. Nowhere is the need for investment and economic development greater than in Indian tribal communities, where unemployment rates routinely exceed 50% and the poverty rate hovers around 25%.

The Quapaw Tribe has in the last decade made great strides toward fulfilling the goals of Indian self-determination and self-governance, and particularly toward its goal of economic self-determination. In 2002 our tribe employed less than 40 persons. Today, the Quapaw Tribal government and its governmental arms and enterprises employ in excess of 1,600 persons, making it one of the largest employers in the area where the border of Oklahoma, Kansas, and Missouri meet. None of these new jobs would exist without the efforts of the Quapaw Tribe, and they are jobs that we have created within our Indian country. They are not jobs taken from other communities or jurisdictions by acquisition or merger or otherwise. Importantly, our tribe has created many quality jobs—including career and management-level positions in the resort and

hospitality industry, the gaming business, retail, law enforcement and fire protection, emergency medical services, and in other areas. With this growth, we increasingly have encountered provisions in federal and state law that fail to recognize our tribe's status as a government. In particular, there continues to be lack of recognition not only among the general population but also under federal law that the enterprises Indian tribes use to generate revenues for governmental functions and services do not serve a "commercial" purpose, but rather they fund tribal *governmental* operations, and thereby serve as a substitute for Indian tribes' lack of viable tax bases.

The last major congressional action in the area of federal tax code issues as they relate to Indian tribal governments came in 1982 with the enactment of the Tribal Tax Status Act to treat tribes like states for various tax purposes, including issuing tax-exempt bonds. Since 1982, tribal tax matters have been addressed on a sporadic basis, such as enacting tax credits to attract jobs and investment to Indian lands, clarifying the treatment of tribal pensions, providing tribes-as-states treatment pursuant to the Federal Unemployment Tax Act, and clarifying tribal economic development bond authority.

In the intervening years, Indian tribal economic activity has boomed, and in many cases tribes serve as the economic engines in their geographic regions. However, in many instances the state of the law has not kept pace with these positive developments and efforts are underway to re-visit and improve the Internal Revenue Code provisions (the "IRC") affecting tribes and tribal members. To-date, Indian tribes and tribal organizations have identified three broad categories of IRC-related issues:

(a) *Issues of Tax Parity.* Various provisions of the IRC fail to treat Indian tribes as other governments, and most of these instances are due to inadvertent errors or mere oversight on the part of the drafter. Examples include excise taxes, treatment of charities funded or former to support tribal governments, treatment of tribes as states for purposes of federal legislation to collect state sales taxes, and others.

(b) *Tax Extenders.* Several IRC provisions affecting tribal communities have lapsed authorizations. Several are related to improving the attractiveness of investing in tribal communities, such as the Accelerated Depreciation Allowance, the Indian Wage and Health Credit, the Indian Coal Tax Credit, and various renewable energy production and investment tax credits.

(c) *Overzealous Internal Revenue Service Targeting of Tribes and Tribal Members.* For the last decade, the IRS has been conducting a targeted auditing initiative of tribally issued bonds. In a three-year period, the tribal bond offerings had a 15% chance of being audited even though these bonds represented a mere 0.1 percent of the total tax-exempt bond universe. Similarly, in 2005, the IRS launched its "Gaming Initiative," an effort by the agency to scour tribal government records to determine whether tribes are keeping appropriate records and spending their funds in a way that the IRS deems appropriate.

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The Quapaw Tribe has some specific concerns with respect to federal tax policy relating to Indian tribes, including:

(1) The lack of clear recognition in tax law of Indian tribes as governments, and of their arms and enterprises as governmental funding sources, frequently results in tribes' being treated as commercial businesses for tax purposes under state laws.

(2) Current federal law relating to state taxation in Indian country is, in many states, including Oklahoma, providing a deterrent to tribal economic development. For example, negotiation of reasonable and fair tribal-state tax compacts increasingly has become difficult, as the states—under the Supreme Court's decisions such as *Oklahoma Tax Commission v. Citizen Band of Potawatomi Indian Tribe*, 498 U.S. 505 (1991)—hold the balance of the bargaining power, and increasingly present tribes with take-it-or-leave-it compact proposals. There is a general lack of recognition that economic activity in Indian country—even involving the sale of so-called “imported” products—relates to a market that would not exist but for a tribe's own initiatives.

(3) The continuing failure of federal securities laws to recognize Indian tribes as accredited investors penalizes the tribes and tribal enterprises that have been successful in standard financial markets.

(4) The Internal Revenue Service's (the “IRS's”) policies characterizing tribes' economic activities as “commercial” functions incorrectly treats the revenue-creating activities of tribes as “commerce,” and places tribal employees on an unequal footing with state and other governmental employees in areas including benefit and health care plans.

(5) The Internal Revenue Service's current application of the general welfare doctrine fails to acknowledge tribal sovereignty and tribes' traditions of taking care of their own people.

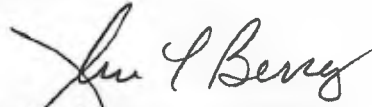
I can cite many other examples of problems arising in federal tax law that our tribe has encountered. Overall, the lack of clarity and/or uncertainty in federal tax policy relating to Indian tribes results in uneven and unfair tax treatment by both the federal government and the states, and often serves as a disincentive to economic development. At the appropriate time, I would look forward to providing the Committee with additional comments on these issues, along with some suggestions about appropriate legislative fixes.

Amendment and clarification of the IRC with respect to a variety of key tribal tax matters could serve to correct the widespread misperception that Indian tribes are commercial businesses, and could help place their tax treatment on a more appropriate footing. The efforts of the Ways and Means Committee in the 113th Congress, therefore, bring a rare opportunity for

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Indian Country to identify needed IRC reforms and advocate for their enactment.

Sincerely,

A handwritten signature in black ink, appearing to read "John L. Berrey". The signature is fluid and cursive, with the first name "John" and last name "Berrey" clearly legible.

John L. Berrey, Chairman
Quapaw Tribe of Oklahoma (O-Gah-Pah)

JLB/

cc: Hon. James Inhofe, U.S. Senate
Hon. Tom Coburn, U.S. Senate
Hon. Markwayne Mullins, U.S. House of Representatives
Hon. Tom Griffin, U.S. House of Representatives